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No. 88-226

IN THE

Supreme Court of the United States

October Term, 1988

BENJAMIN R. WARD, *et al.*,

Petitioners,

-against-

ROCK AGAINST RACISM,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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ARGUMENT

RESPONDENT'S ASSERTIONS THAT THE CITY'S USE GUIDELINES CONTROLLED ARTISTIC EXPRESSION ARE, AS THE DISTRICT COURT HELD AFTER TRIAL, BELIED BY THE RECORD AND DEVOID OF ANY FACTUAL SUPPORT.

(1)

Relying on emotionally charged language ("state controlled sound" [Resp.'s br., p. 20]) and inflammatory accusations (the Use Guidelines are "tantamount to telling a writer what words to use and a painter what colors to put on canvas" [Resp.'s br., p. 15]), respondent contends that the City's Use Guidelines regulat-

ing sound at the Naumburg Bandshell in Central Park impermissibly infringe on its right of freedom of expression. Respondent goes so far as to allege that the case at bar "is not about the regulation of 'noise' but rather petitioner's attempt to control artistic expression." Resp.'s br., p. 13.

Respondent's argument fails for two fundamental reasons. First, the City proved at trial, and the District Court and Circuit Court both held that the Use Guidelines challenged were formulated for the legitimate purpose of preventing noise generated at Bandshell events from intruding offensively upon other park users and nearby residents (A12-13; 43-44).[1] Both courts recognized, in keeping with the prior holdings of this Court, that content-neutral regulations enacted for the purpose of maintaining a modicum of tranquility in an urban environment serve a substantial governmental interest. *Grayned* v. *City of Rockford*, 408 U.S. 104, 116 (1972); *Kovacs* v. *Cooper*, 336 U.S. 77, 87-89 (1949).[2] Second, the City proved at trial and the District Court so held, that as a matter of fact, the Use Guidelines did not adversely affect or infringe upon any Bandshell user's freedom of expression (A41, 89). What makes both of these findings particularly noteworthy in the face of respondent's present assertions is that respondent never used or even observed the use of the City-hired sound system and sound engineer (JA123). In addition, respondent, who so shrilly claims First Amendment deprivation, recognized that the only outer limit on noise at Bandshell events was when the "people's ears . . . bleed" (JA118).

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[1] Numbers in parentheses preceded by the letter "A" refer to pages of the Appendix of the Petition for a Writ of Certiorari. Numbers in parentheses preceded by the letters "JA" refer to pages of the Joint Appendix.

[2] Respondent does not believe regulating excessive noise constitutes a substantial governmental interest although it did not seek this Court's review by cross-petition for a writ of certiorari of the contrary holding of the Second Circuit. Resp.'s br., p. 21. Respondent neither explains why excessive noise should not be subject to regulation nor why *Grayned* or *Kovacs* are not controlling on this point.

(2)

Ignoring the evidence adduced at trial and the fact-finding of the trial court, respondent characterizes the regulations as formulating "state controlled sound." Resp.'s br. p. 20. Respondent goes so far as to characterize the regulations as the City's attempt to "control 'artistic expression.'" Resp.'s br. p. 72. Nothing could be further from the truth.

Both the District Court (A44) and the Court of Appeals for the Second Circuit (A12-14) held that the express purpose of the Use Guidelines was to prevent noise generated at the Bandshell from intruding offensively upon those who did not choose to attend or hear the musical event (A12, 44). The Use Guidelines do not, as suggested by respondent, tell a writer what to write, a speaker what to say, or a musician what to play or with what instrument. *See*, Resp.'s br., pp. 15-19. The regulations do, however, allow the City to place a limit on the loudness of the amplified sound of the speaker or musician.[3]

Respondent and the Second Circuit, however, adhere to the view that to require the user of the Bandshell to use the City-hired sound company, its equipment and its sound engineer is tantamount to standardizing expression. Neit her respondent at trial or in his brief nor the Circuit Court in its opinion provide any evidentiary support to substantiate this view.

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[3] We note that unlike the regulations that this Court will review in *Bd. of Trustees of the State University of New York* v. *Fox*, 841 F.2d 1207 (2d Cir. 1988), *cert. granted*, _U.S._, 57 U.S.L.W. 3200 (October 3, 1988) (No. 87-2013), the Use Guidelines allow any user of the Bandshell to communicate his/her views fully without regard to their content. The regulations at issue in *Fox*, however, provide that "[n]o authorization will be given to private commercial enterprises to operate on State University campuses or in facilities furnished by the University other than to provide food, legal beverages, campus bookstore, vending, linen supply, laundry, dry cleaning, banking, barber and beautician services and cultural events." Brief for Petitioners, Board of Trustees of the State University of New York, p. 2.

The City-hired sound company and sound engineer were bound by the order of the District Court dated April 30, 1987 (A88-89) and the directions of the Program Director, Joseph Killian (JA229-230), to provide any Bandshell user with the quality of mix and reproduction they desired. While the City maintained ultimate control of the mixing board as to volume, the sound engineer had to follow directions of the user's representative as to mix (JA222, 229).

After five days of testimony and after the District Court in its Opinion dated April 6, 1987, sustained the constitutionality of the Use Guidelines and their implementation insofar as they regulated sound (A46-47), respondent moved to amend the judgment to clarify whether the District Court's opinion allowed RAR to "actually control the mixing board and sound system" (JA486). By its Memorandum Opinion, dated April 30, 1987, the District Court interpreted RAR's motion to "suggest" that the City-designated sound engineer "is not able properly to implement a sponsor's instructions as to sound quality or mix" (A89). Significantly, and contrary to the whole underlying premise of respondent's argument that the Use Guidelines infringe on First Amendment expression, the District Court held:

> No evidence to that effect was offered at trial; as noted the evidence is to the contrary (A89).

In other words, when respondent, who initiated this litigation, was given an opportunity to prove at trial that "[p]rotection of musicians' and concert promoters' right to 'artistic expression' would be meaningless if it did not include the right to use their own sound system and sound engineer because of the crucial role of 'mixing' in musical productions" (Resp.'s br., p. 14), it failed to present a single witness to substantiate the claim. The City produced not only witnesses who demonstrated the efforts of Parks Department's officials to formulate guidelines that would both satisfy the City's need to regulate noise at Bandshell events while giving users unfettered expression, but they also presented evi-

dence that convinced a District Court to make a factual finding that the City was able to provide any artist using the Bandshell with the sound quality or mix they desired (A89). Respondent has pointedly avoided the import of this finding which is entitled to special deference. *Bose Corp.* v. *Consumers Union*, 466 U.S. 485, 499-500 (1984); *United States* v. *United States Gypsum Co.*, 333 U.S. 364, 393-395 (1948); Fed. Rules of Civ. Pro. 52(a).

(3)

Having no evidence to substantiate their contentions, respondent mischaracterizes the implementation of the Use Guidelines and claims that "[t]he First Amendment does not permit and cannot tolerate state control of artistic expression merely because the state claims that is [sic] efforts will lead to 'top quality' results" (citation omitted). Resp.'s br., p. 19. Respondent, without reference to any evidence adduced at trial, attempts to persuade this Court that the Parks Department's Use Guidelines allow the City to foist a monolithic sound system monitored by a robot-like engineer onto unwitting artists. The evidence produced by the City at trial showed otherwise.

Gary Floyd, a sound consultant of considerable experience (JA141-144), was hired by Joseph Killian to help choose a sound company that would be used to implement the Use Guidelines. Floyd chose New York Sound after comparing the sound equipment inventory of each bidder and after speaking with contractors who had used each bidder (JA152-153). In this way, Floyd chose New York Sound because he found that it could provide the expertise, the inventory of sound equipment and performance demeanor that could best suit Bandshell users (JA152). Thereafter, Killian did not simply hire New York Sound but examined them on a trial basis for nine events (JA155). Importantly, technical questionnaires were sent to groups months in advance of their Bandshell events in order to elicit their exact sound amplification needs. In this way, a particular performer or group's technical

needs could be addressed by the City-hired sound company (JA61-63, 165-166).

Thus, rather than provide a single "sound system," as suggested by respondent, the Parks Department provided each Bandshell user with a system tailored to the individual's event, needs and desires.[4] With respect to the use of the equipment, the Parks Department established at trial that the hired sound company had the flexibility to give any performer or group or user of the Bandshell an amplification system dedicated to their needs, while allowing ultimate control of the volume to remain with the City (JA40; 41; 46-47, 88-89).

(4)

Respondent in its brief, contends that "as a result of [the Use Guidelines] musicians and other users of the Bandshell whose music can only be performed successfully by a sound engineer familiar with his work and on a particular sound systems (sic), are subjected to harshly different treatment than other users of the Bandshell." Resp.'s br., p. 16. However, at trial, respondent, who was not only unfamiliar with the sound equipment and engineer provided by the City-hired sound company, but, in fact, never even attended any event at the Bandshell during which New York Sound provided sound amplification (JA123), produced not a single witness to substantiate this notion which is central to its claim of First Amendment infringement.

Respondent did have its sound engineer, Alan Thompson, testify. He explained the intricacies of working the mixing panel

[4] In addition, the Parks Department sought to provide groups unfamiliar with producing events outdoors, and who sometimes came with inadequate equipment, with an inventory of equipment and professional know-how that would enhance their performance. Often such groups had resorted to raising volume to compensate for their inadequate equipment and inability to "mix" their sound properly in the out-of-doors (JA218). With the Use Guidelines, the Parks Department sought to contain the bleed of excessive noise of such groups and disappointment of audiences who recognized their inability to provide properly mixed sound (JA30, 219).

(JA100-101). He explained that manipulation of the dials on the mixing panel requires "artistic understanding" (JA102). Thompson was not asked if his function could be performed with equal sensitivity or artistry by another sound engineer, nor did he contend that it could not be.

In contrast, Gary Floyd indicated during his testimony that a good sound engineer could reflect the aesthetic choices of the musician (JA180). Floyd explained that the sound engineer obtains the necessary information concerning the performer's preference at the beginning of the performance. The performers, said Floyd, are very specific about what they like and dislike (JA180).[5] In this way, stated Floyd, an experienced technician can, within a span of "generally five minutes," learn how to provide the desired mix of any band (JA181).

Even if respondent had been able to call a musician to testify that only RAR's sound engineer, Alan Thompson, could produce their music in a satisfactory manner, such testimony would not establish a constitutional violation. If the constitutionality of time, place, and manner regulations were dependent upon a performer's complete satisfaction with them, then any such restraints challenged in litigation as unconstitutional would, by definition, be unconstitutional by the mere fact that a dissatisfied performer brought suit. The vagueness and variability of such a standard would, itself, be unconstitutional. The problems inherent in such a variable standard are exemplified in this case, where respondent's sound engineer testified that only a sound level causing physical injury to one's ears could be characterized as "excessive." Were the City required to draft regulations that satisfied respondent's sound engineer, they would not be able to

[5] Alan Thompson, sound engineer for RAR, described the process in virtually the same terms as Floyd. When asked how he knows what a group's "taste" is, Thompson said: "They have their manager and/or their sound mixer present at my elbow... [o]r they tell me what they want previously and they give me a list of songs, saying they want echo or reverb here or there and they want this and that" (JA101).

draft any meaningful regulations. Clearly, this is not, and cannot be, the appropriate constitutional test.

The District Court accepted Mr. Floyd's testimony and found that the City-hired sound engineer could provide whatever mix any musician or artist has requested (JA88-89). In light of the District Court's finding, respondent's First Amendment interest is reduced to whatever value there is in using its own sound equipment. To find First Amendment infringement on this basis, where the record is devoid of proof that any user's artistic expression was compromised by the City-hired sound engineer, is to trivialize the City's interest in regulating noise—a regulation that this Court has recognized as a substantial governmental interest. *Kovacs* v. *Cooper, supra.*

(5)

As we noted in our main brief, Joseph Killian considered a number of alternatives before determining that the best solution was an independent professional sound company. Pet.'s br., p. 9. Respondents, at trial, did not offer any alternative solutions.

Now in its brief to this Court, respondent suggests that "more reasonable alternatives than those employed by respondents (sic) are readily available." Resp.'s br., p. 22. Respondent suggests enforcement of existing laws and regulations against excessive noise. At the trial, the City proved that summonses for excessive noise issued to RAR on earlier occasions were never paid (JA343). The evidence also showed that RAR repeatedly violated agreed-upon sound levels in the face of repeated requests by police to reduce sound (A 47; JA131-133; 345-347). At least one request to turn down the sound resulted in RAR members provoking the crowd against the police (JA346-347). And, at least twice, the plug on RAR had to be pulled in order to stop their event from continu ng beyond the time allotted on their permit (JA140-141). Ignoring its history of uncooperativeness and belligerence, respondent now suggests as an alternative solution the es-

tablishment of a decibel limit. Resp.'s Br., p. 22. The proof at trial showed this solution to be impractical (JA220, 285-286).

Respondent also recommends use of a sound control device as an alternative solution to the noise problem at the Bandshell. Resp.'s br., p. 22. Respondent offered no proof at trial, and offers no proof now, that such a solution is technically feasible and a practical solution. The Second Circuit, also without any evidence, makes the same suggestion, finding that in the alternative, the City can always pull the plug to enforce sound limits (A18-19, 21).[6] The impracticality of such a solution before an excited crowd at a concert is self-evident.[7] The City's solution as provided by the Use Guidelines, however, has been tested and proven.

(6)

Respondent also contends that the Use Guidelines give City officials "unfettered control over musicians and concert promoters right to freedom of expression . . . " Resp.'s br., p. 16. Respondent's claim makes no reference to the record. Certainly, the Use Guidelines do not provide park officials with any discretion in granting or denying a permit for the Bandshell based on the content or viewpoint of speech of the permittee. *City of Lakewood* v. *Plan Dealer Pub. Co.*, __U.S.__, 108 S. Ct. 2138, 2145 (1988). They

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[6] The difficulty with respondent's and the Circuit Court's suggestion is that it takes no account of the fact that the controls, volume, and mixing are contained on a single board and are manipulated, as explained by Alan Thompson, sound engineer for RAR, continuously during the performance (JA101-102; 120-122). Thus, to separate the two interrelated functions and place the mixing controls in one party's hands and the volume control in another's (assuming the feasibility of such a solution) is to create a contentious predicament whereby the user's expression might be compromised because of lack of coordination between the two controls. Allowing both functions to be in the hands of one qualified person allows the mix and volume controls to be adjusted in a complimentary way that suits the expression of the Bandshell user, while containing volume within the audience area.

[7] It is worth noting that while the Second Circuit concludes that pulling the plug is a less restrictive alternative to maintaining volume control, the District Court reached the opposite conclusion (A48).

do, however, limit the user's expression insofar as the volume may be raised only so that listeners in the Bandshell area should be able to hear the performance, while others are not necessarily obliged to listen to it (A14-15). Insofar as respondent claims that the Use Guidelines "[do] not even acknowledge the interests of performers and/or their audience in the quality of the music produced" (Resp.'s br., p. 17), the District Court found that they have been interpreted by the Parks Department to require providing sound mix and quality tailored to the dictates of the user, while ultimate control of the volume has remained under the City's control (A40, 42, 47). *Hoffman Estates* v. *Flipside, Hoffman Estates*, 455 U.S. 489, 494 n.5 (1982), citing *Grayned* v. *City of Rockford*, *supra*. ("In evaluating a facial challenge to a state law, a federal court must, of course, consider any limiting construction that state court or enforcement agency has proferred.") In addition, the Use Guidelines are framed in terms of providing "the best sound for all events" (375). *Grayned* v. *City of Rockford*, *supra*, 408 U.S. at 108. Since the District Court found that the Parks Department's construction and implementation of the Use Guidelines has been proven to provide users with the mix and quality sound they sought (A88-89), respondent's contention is without evidentiary substantiation.

Respondent hypothesizes a host of potentially unconstitutional applications of the Use Guidelines. Again, without reference to the record, respondent asks "what if" the City "decides it can no longer afford New York Sound and hires one of the companies it previously rejected?"; or "[w]hat if the engineer for New York Sound becomes ill and his replacement is less talented or experienced?" and so on. Resp.'s br., p. 20. Respondent's questions are premature. If the Use Guidelines survive facial scrutiny, then any subsequent unconstitutional application should be reviewed on a case-by-case basis. *See, Broadrick*, v. *Oklahoma*, 413 U.S. 601, 615-616 (1973). The theoretical possibility that the Parks Department may enforce the Use Guidelines in an unconstitutional manner does not give rise to a present constitutional claim.

Hoffman Estates v. *Flipside, Hoffman Estates, supra*, 455 U.S. at 503 n.21 (A49).

CONCLUSION

The Judgment Of The Court Of Appeals For The Second Circuit Should Be Reversed, With Costs. The Judgment Of The District Court Which Declared The Use Guidelines Constitutional Insofar As They Required Permittees To Use Only The Department Of Parks And Recreation's Sound Engineer And Sound System Should Be Reinstated.

New York, New York
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